



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

JAN 23 2003

The Honorable Charles E. Schumer
United States Senate
Washington, DC 20510

Dear Senator Schumer:

I am responding to your letter dated January 23, 2003, in which you once again requested that the Department disclose the confidential and privileged appeal, certiorari and amicus memoranda that Miguel Estrada authored when he was a career lawyer in the Office of the Solicitor General. You continue to insist that disclosure of this sensitive material is necessary to allow you adequately to address Mr. Estrada's nomination to the United States Court of Appeals for the District of Columbia Circuit -- a nomination that has been pending for some 624 days. As you know, Mr. Estrada has received a unanimous "well qualified" rating from the American Bar Association, the ABA's highest rating.

We addressed fully the assertions made in your most recent correspondence in our previous letters to you dated June 5, 2002, and October 8, 2002 (attached herewith). Our previous explanations remain equally applicable today, and we therefore must again respectfully decline your request. As we have explained, the relevant historical, policy and legal considerations implicated by your request establish that disclosure of these memoranda from the Office of Solicitor General would undermine the integrity of the decisionmaking process in that Office. Notwithstanding our previous letters, several specific items in your letter merit discussion.

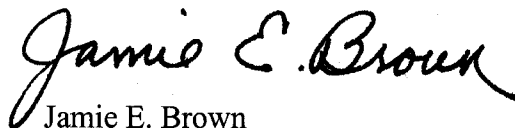
At Mr. Estrada's hearing, you asserted that the Department disclosed memoranda written by Judge Easterbrook in connection with *his* confirmation hearing. In response to that claim, as we noted in our letter of October 8, 2002, we comprehensively reviewed the Department's files and the public record of Judge Easterbrook's confirmation hearing and we found absolutely no evidence that the Department authorized the release of these memoranda in connection with Judge Easterbrook's nomination. Your most recent letter now asserts that the Easterbrook documents "apparently" were provided to the Committee in connection with Judge Bork's nomination. However, the public record of Judge Bork's confirmation hearings contains no mention of the Easterbrook memoranda you reference. As we explained previously, your mere possession of these documents does not suggest that the Department waived applicable privileges nor authorized their disclosure in connection with either nomination.

You also suggest in your letter that the Administration's decision to disclose legal memoranda from the White House Counsel's Office in connection with the nomination of Jeffrey Holmstead to serve as Assistant Administrator of the Environmental Protection Agency serves as precedent for disclosing Mr. Estrada's highly privileged work product. As you may be aware, the White House initially declined to provide all of Mr. Holmstead's files as requested by the Senate Environment and Public Work Committee, on the basis of the deliberative process, attorney-client and work product privileges. In response, the Environment Committee, based on its particularized concerns and allegation of misconduct regarding one specific subject, requested a small subset of documents related only to that matter. Because of the specificity of the Environment Committee's concerns, the White House permitted the Committee to review that limited subset of materials, which answered the allegation in question. This example, if anything, further demonstrates the overbreadth and impropriety of the current request -- a request that some have characterized as a fishing expedition requesting *all* documents authored by Mr. Estrada about *all* subjects during his *entire* tenure in the Office.

Finally, we respectfully submit that, despite your view to the contrary, your request threatens the proper functioning of the Office of the Solicitor General. All seven living former Solicitors General, including Archibald Cox, Drew Days, Walter Dellinger and Seth Waxman, have written to the Senate Judiciary Committee and explained the debilitating impact your request would have on the ability of the Office to represent the United States in litigation. The letter -- authored by distinguished lawyers of both parties -- noted that their "decisionmaking process required the unbridled, open exchange of ideas -- an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure." While we respect your right to disagree with these seven former Solicitors General, we must defer to their considered judgments about the impact of disclosure based on their collective experience of decades heading the Office. Thus, we respectfully adhere to our previous decision to protect these highly privileged documents from disclosure.

Thank you for considering the Department's views on this matter. As we have noted previously, the public record is more than adequate for the Committee to evaluate Mr. Estrada's qualifications to be a Circuit Judge on the D.C. Circuit. We look forward to Mr. Estrada's prompt consideration by the Committee and confirmation by the full Senate.

Sincerely,



Jamie E. Brown
Acting Assistant Attorney General

Enclosures

cc: The Honorable Orrin G. Hatch, Chairman
The Honorable Patrick J. Leahy, Ranking Member
The Honorable Alberto Gonzales